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No. 88-1566

In The

Supreme Court of the United States

October Term, 1988

CITY OF LITTLE ROCK,

Petitioner,

vs.

DEBBIE WILLIAMS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HONORABLE MARK STODOLA
City Attorney
and THOMAS M. CARPENTER *
and MELINDA S. RALEY
Assistant City Attorneys
City Hall, Room 310
Little Rock, Arkansas 72201
(501) 371-4527

Counsel for Petitioner

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the retaliatory firing of a court clerk by a municipal judge given the authority, by custom or practice, to hire and fire his court personnel establishes an unconstitutional municipal employment policy for which a municipality may be held liable under 42 U.S.C. § 1983?

REPLY TO BRIEF IN OPPOSITION

The entire brief in opposition is premised on the theory that the City has changed its position in this case and, therefore, should not be permitted to seek review by this Court. This suggestion is without merit. Williams is simply incorrect when she states that the issue presented by this petition was not presented to the lower courts.[1]

1. Despite Williams recently articulated suggestions to the contrary, the City has been consistent in its presentations to this Court. To illustrate, the various "Question[s] Presented," in this case are as follows:

> Whether a single isolated unconstitutional firing of a court clerk by a municipal judge possessing authority to hire and fire his employees establishes an official policy, custom or practice of a municipality sufficient to render the municipality liable for damages under 42 U.S.C. § 1983. (Petition for writ of certiorari, No. 85-249, October Term, 1985).

> Whether the improper firing of a court clerk by a municipal judge given the discretion to hire and fire his employees establishes an unconstitutional municipal employment policy for which a municipality may be held liable under 42 U.S.C. § 1983? (Petition for writ of certiorari, No. 86-1049, October Term, 1986).

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[1] Further, due to the changing nature of the law in this area, this Court has stated that an imprecise articulation of the grounds for relief in the lower courts is not a reason to dismiss a certiorari petition. *City of Canton v. Harris*, 109 S.Ct. 1197, 1202 (1989). This ruling in *Canton* is definitely applicable to a case, like this one, that has already been granted certiorari on two occasions.

> Whether the retaliatory firing of a court clerk by a municipal judge given the authority, by custom or practice, to hire and fire his court personnel established an unconstitutional municipal employment policy for which a municipality may be held liable under 42 U.S.C. § 1983? (Petition for writ of certiorari, No. 88-1566, October Term, 1988).

In short, the City has been remarkably consistent in the questions presented to this Court. The City is not raising any new theory based upon changes in the law.

2. More to the point, the City's defense is premised on the argument that it is being subjected to § 1983 liability under a theory of *respondeat superior*: a result prohibited by this Court since *Monell. City of Canton v. Harris*, 109 S.Ct. at 1206. Indeed, the very first trial pleading filed by the City raised this issue in unmistakable language:

> . . . if the allegations of [Williams'] complaint were proven, the result would be the exoneration of the City of Little Rock from any liability because that proof would establish that defendant Butler acted in the premises completely outside of and beyond the scope of his authority . . . *Debbie Williams, et al, v. William R. Butler, et al*, LR-C-91-633, U.S. Dist. Ct. (E.D. Ark.), Third Party Defendant's [City's] Motion To Dismiss, ¶ 5 (February 17, 1983). [Explanations added]

The articulation of the issue, as first addressed to the Eighth Circuit Court of Appeals, was that "The district court erred in finding and concluding that [Butler's] act of discharging the plaintiff established city policy." [*Williams v. Butler*, 83-2534, Appellant's Brief at 4.] The thrust of the City's argument on appeal has always been that Butler was not a policymaker. (The affirmance by the

Eighth Circuit, when an opinion has issued, has been limited to a finding that Butler was a policymaker as opposed to being merely a decisionmaker.) It is simply disingenous for Williams to suggest that the City is only now raising the issue of Butler's status.

2. This case presents a significant question of law that the Court should decide. Williams suggests that this case only presents a factual issue. This is simply untrue. As noted in the petition, there is a conflict in the circuits as to the legal distinction between a policymaker and a decisionmaker. [Petition at 11.][2] This problem is premised upon conflicting interpretations of a plurality statement in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-483, n.12 (1986). This case presents the Court with a clear opportunity to resolve that conflict and to more fully define the parameters of municipal liability under § 1983.

3. This case was tried during the same time frame as *Canton* and *City of St. Louis v. Praprotnik*, 108 S.Ct. 915 (1988). In *Praprotnik* the Court noted that throughout the litigation the parties had "been confronted with a legal landscape whose contours are 'in a state of evolving definition and uncertainty'." 108 S.Ct. 922. As a result, the Court has focused more on whether the issue presented was likely to recur in § 1983 litigation. Because the question presented was likely to recur, the Court accepted jurisdiction.

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[2] This Court has already noted the conflict between the Fifth and Eighth Circuits as to when a single decision is enough to establish unconstitutional municipal policy. *City of St. Louis v. Praprotnik*, 108 S.Ct. at 924.

This case presents a question that is likely to recur often. If the Eighth Circuit's rationale is followed, every municipality that has a custom or practice of letting supervisors hire and fire employees may be liable under § 1983 for an unsanctioned retaliatory firing. The circuit courts of appeal are in conflict as to whether such a result was rejected in *Pembaur* and in *Praprotnik*. This Court should grant certiorari because this case presents a clear opportunity to determine whether supervisors are policy-makers, for purposes of municipal liability under § 1983, merely because city custom or practice permits them to hire and fire employees.

CONCLUSION

For the reasons stated in the petition and in this reply, the Court should grant the writ.

Respectfully submitted,

HONORABLE MARK STODOLA
City Attorney
and THOMAS M. CARPENTER *
and MELINDA S. RALEY
Assistant City Attorneys
City Hall, Room 310
Little Rock, Arkansas 72201
(501) 371-4527

Counsel for Petitioner

* Counsel of Record